themselves faithful and active under the new leaders whom the state may appoint, and meanwhile to elect temporary commanders. The response is a demand, proceeding chiefly from their political friends, that they themselves remain in office till their successors arrive. Without the unanimous assent of the soldiers, they fear to do this, so they deprecate any factious resistance to the will of the state (although apparently they would not be unwilling to remain if the demand were unanimous) and prudently appeal to the men to remember their past services and give them a fair hearing in case anyone in the camp has any charge to bring against them. When no one makes any complaint, but the demand that they remain in office until their successors arrive becomes unanimous, they consent to do so.

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THE CASE OF THE MARCELLI

In Cicero's *De Oratore* (i. 39. 176) Crassus, in discussing the importance of knowledge of technical law, says: *Quid? qua de re inter Marcellos et Claudios patricios centumviri iudicarunt, cum Marcelli ab liberti filio stirpe, Claudii patricii eiusdem hominis hereditatem gente ad se dicerent redisse, nonne in ea causa fuit oratoribus de toto stirpis et gentilitatis iure dicendum?*

The explanations that have been offered of this difficult passage are many and various. Two may be given as types.

Roby in his note on the passage in A. S. Wilkins' edition of the *De Oratore*[3] (1895) believes the situation to have been the following.[1]

A slave belonging to a Marcellus had been manumitted and thus, though free, was still attached to the manumittor and his family. His son, however, was *ingenuus*, and therefore had no patron. If this son died, his property would fall, first, to his own immediate heirs; second, to his agnates; third, and finally, would pass by the law of the Twelve Tables to his *gens*. That law runs (Lex XII Tab. v. 4, Bruns Fontes[7], p. 23): *Si intestato moritur cui suus heres nec escit, adgnatus proximus familiam habeto: si adgnatus nec escit, gentiles familiam habento.*

This freedman's son did die intestate, and the question arose: Who are his clansmen? The Claudii were an old clan, subdivided long ago into at least two important branches. One of these, the Marcelli, whatever its origin, was plebeian. Now the Marcelli by virtue of their distinction and age might well claim full gentile rights, and the issue in the case at bar is whether such a claim could be maintained against that of the patrician Claudians to be the only members of the Claudian gens.

Piderit (*De Oratore*[2], p. 368) gives the following version: A slave of the (patrician) Claudii, belonging as such to their family, is manumitted and enters the family of the Marcelli. Upon the death of this man's son the

[1] Substituted by Wilkins for his own note in previous editions.

Claudii claim the right of patrons, the Marcelli that of relations, "weil er seiner nächsten Abkunft nach (*stirpe*) zu ihnen gehöre."

Most commentators[1] incline toward the theory set forth by Roby that the Marcelli and the Claudii stood opposed as two separate organizations to vindicate against each other the gentile reversion to the estate.[2]

Piderit's version is cited only for his insistance upon the word *stirpe*. Otherwise his suppositions have no determinable relation to the words of the text.

If we examine the passage, one thing at least is plain. The Claudii claim as *gentiles*. Cicero in the *Topica* (6. 29) has given us a vigorously discussed definition of *gentiles: Gentiles sunt inter se qui eodem nomine sunt, qui ab ingenuis oriundi sunt, quorum maiorum nemo servitutem servivit, qui capite non sunt deminuti.*

If this definition is accurate—and Cicero cites for it the weighty authority of the pontifex Q. Scaevola—this man can have had no *gentiles* whatever. He would be excluded by both the second and third qualification. The suggestion of Ortolan (*loc. cit.*) that the Claudians may have been *gentiles* to him, while he did not bear that relation toward them, is rendered inadmissible by the words *gentiles inter se.*

However, we need not take the words too literally. The citation of the pontifex Scaevola as authority justifies the assumption that the definition was framed for sacral purposes, where minutiae might well be insisted upon that the practical law would disregard. We may safely suppose that for all ordinary legal relations, an *ingenuus* would be reckoned in the clan of which he bore the name.[3]

[1] So Ortolan, *Expl. historique* (iii. 8) 1051, n. 1, regards the claim of the Claudii as that of a *famille supérieure;* and Greenidge *Roman Legal Procedure*, p. 184.

[2] It is very likely that the Marcelli, in numbers, were at least equal to the other Claudii, and that, in popular estimation, the plebeian and patrician families were co-ordinate in importance and even in nobility. So we hear Asconius, *in Scaurianam*, p. 33 (Kiessling), *fuerunt enim duae familiae Claudiae, earum quae Marcellorum appellata est plebeia, quae Pulchrorum patricia.*

It is this double character of the *gens*, as well as the adoption of P. Clodius, to which Cicero alludes when he affects to doubt (*Pro Scauro* 15. 34) whether C. Claudius was patrician or plebeian.

That the Marcelli possessed at least one important privilege of a *gens*, that of the *patronatus* of conquered peoples, we know from the *Verrines*, particularly *in Verr.*, Act II, L. ii. 49. 122: *C. Claudius (Appi filius Pulcher) adhibitis omnibus Marcellis qui tum erant, de eorum sententia leges Halaesiuis dedit.* This took place in 95 B.C., in the consulship of the very Crassus in whose mouth Cicero puts this discussion.

[3] Besides, Cicero's definition is not quite accurate from the logical point of view for which alone it is introduced. As stated, it would exclude from gentile communion a man who had been captured by the enemy and restored to his rights as a citizen by ransom or escape *iure postliminii*. Boethius in his commentary on this passage of the *Topica* notices this: *Quid si libertorum nepotes civium Romanorum eodem nomine nuncupantur? num gentilitas ulla est? Ne id quidem quoniam ab antiquitate ingenuorum gentilitas ducitur.* Boethius correctly, if somewhat surreptitiously, adds the words *civium Romanorum.* The *servitus* must be a *iusta servitus* under Roman citizens.

Granting that this freedman had *gentiles* and that the *Claudii patricii* asserted their right to be so regarded, was this claim controverted by the Marcelli? If that were the case, the passage would have run: cum *et* Marcelli ab liberti filio *et* Claudii patricii eiusdem hominis hereditatem *gente* ad se rediisse dicerent. If anything seems obvious, it is that the two claimed on altogether different legal theories. This is borne out by the phrase *de toto stirpis ac gentilitatis iure* of the following sentence. It might be conceivable that *stirpe* is, in a sense, a variant for *gente*, but *stirps ac gentilitas* is plainly not a doublette.

Besides it would be difficult to find an instance of the use of *stirps* in the sense of family, large or small, i.e., that group of men connected by a real sacral and an assumed blood bond. *Gens* and *familia* are constantly so employed, the former of a large group, the latter, more generally of a large or small one. Further, we find the *domus*, like the Greek οἰκία, to describe a rather narrow family group, often the narrowest possible one. All these terms not only have a literary currency in these senses but are so accepted in the more precise terminology of law. *Stirps*, on the contrary, regularly denotes *relationship*, and is used where its English equivalent "stock" would be employed.[1] The natural interpretation of Cicero's words is that the Marcelli claimed as relations, the Claudians as members of the dead man's *gens*.

If as relations, we may ask: What relations? If the intestate's father had been the property of all the Marcelli in common—an *aedituus* of a family shrine, for example—the family, as such, would have been his *patroni* and the relation of *patronus* and *libertus* was a quasi-parental one. But we have no reason for assuming that the *patronatus* extended beyond the person of the affranchised slave himself;[2] nor can we justify the use of *stirps* in such a connection. If, then, it was an individual Marcellus whose freedman was the intestate's father, it cannot have been the whole family, but a certain number of men of that name, who are the claimants here.

Stirps in the sense of relationship is necessarily very broad, and includes not only the agnates of the Twelve Tables, but all who would in later law be known as cognates. In the early empire, the praetor had long modified the rigor of the civil law by allowing, after agnates, the entrance of *cognati* into the inheritance,[3] up to the sixth or even seventh degree.[4] When he began to do so, we do not know, but we do know that the second century B.C. witnessed an enormous activity on the part of the praetors not only in completing and assisting but also in correcting the civil law. It is probable enough that the

[1] The nearest approach to the sense required for the common rendering of the passage is in the expression *in stirpes* and *in capita*, applied to the division of inheritances. This, however, is a very different thing from the use of *stirps* as the equivalent of *familia*.

[2] Ortolan (*op. cit.*, p. 44).

[3] Gaius iii. 25. 30; Ulp. Fg. xxviii. 7; (Ulp.) *Collat.* xvi, viii.

Filii sobrini sobrinaeve—Paul. *Sent.* iv. 11. 7.

portion of the praetor's edict on that subject (*unde cognati*[1]) had become, not indeed tralatician, but, in substance, of common occurrence in the edicts of successive praetors as early as 150 B.C. The rights of such *cognati* could be enforced under praetorian formulae, and the *lex Aebutia* had opened the court of the urban praetor to these formulae.[2] But the centumviral court was explicitly excepted by the law. There only the older *legis actiones* were available. There would, therefore, have been no scope for such a *litis contestatio* in the proceedings *in iure* as to permit the *iudex* or *recuperatores* to consider the claims of *cognati*. Indeed not even the constitution of the *iudicium* was within the power of the praetor. Recitation of the *verba solemnia* left him no choice but the reference of the matter to the standing *iudicium* of the centumviri.

If not as cognates, the only possible claim that the term *stirps* allows is that of agnates. Is there any set of circumstances under which the Marcelli might be called the *agnati* of the deceased intestate?

Concubinage of female slaves is an inseparable incident of all slave-holding societies,[3] and a common result of such a relation was the emancipation of the slave and her child. Between citizens and slaves there was of course no conceivable *connubium*, and the child of such a slave, though recognized as the offspring of a citizen, was none the less a slave.[4] After emancipation, this child had, of course, no legally enforceable claim upon his natural father. But as we postulate *agnitio* on the part of the father, there would be a real blood tie between this *libertus* and his legitimate brothers of which the law did, in certain respects, take cognizance.[5] One can easily understand the existence of close personal relations, in despite of the bar sinister, between the legitimate and illegitimate children.

If we suppose the deceased intestate to have been the son of such a *libertus*, the sons and grandsons of the original emancipator would be *patrui* and *patrueles* to him. Assuming *agnitio* and close association, the Marcelli of this case, *patrueles* perhaps of the deceased, may easily have regarded themselves as kinsmen of the dead man and the issue joined here may have been to determine whether a claim so based was valid, whether relationship on the wrong side of the blanket conferred a *ius stirpis* and was not to test the rights of the Marcelli to be called a *gens*. We may find confirmation for our conclusion in the fact stated before, that in 95 B.C.—certainly not far from

[1] *Lenel. Edictum perpetuum* xxiv. B. 3, in Bruns *Fontes*[7], p. 216.

[2] The date of the *lex Aebutia* is much disputed. The consensus of opinion places t nearer to 150 B.C. than to the later date advocated by some. (Cf. Cuq. in Dar. Sagl. *Dict. des. Ant.*, *s.v.* "Leges Publicae," p. 1127.) This case of the Marcelli is not likely to have occurred much before 100 B.C.

[3] Not, of course, the legal *concubinatus*, which required always a *liberta* or a free woman. Cf. *Digest* xxv. 7.

[4] Ulp. Fig. v. 3. 9.

[5] Paul on the Edict, *Digest* 23. 2. 14. 2.

the date of this case—an excellent understanding prevailed between the Claudii *patricii* and the Marcelli, as to certain very highly valued rights—an understanding which is scarcely likely to have existed, if a few years before the two branches were at bitter feud on a question that cannot fail to have aroused bad blood.[1]

MAX RADIN

[I should like to propose a yet different explanation of the case of the Marcelli. Cicero's especial point appears to be that the legal pleader needs a thorough knowledge of law, because out of an apparently simple issue a case of great technical complexity may unexpectedly develop. The case of the Marcelli must, therefore, have been of this character, and all forms of explanation which assume a puzzling question as visible in it from the beginning are on that account unsatisfactory. I accordingly prefer to reconstruct the case somewhat as follows: a Marcellus, son of a freedman of that ilk, died intestate, leaving no direct heirs. Under the law of the Twelve Tables the inheritance would fall to the nearest agnate, that is, to the nearest living at the time when it first became certain that the decedent had died intestate (Gaius iii. 11; cf. Just. *Inst.* iii. 2. 1). Now this nearest agnate had (I surmise) died without entering upon the inheritance. But he left a group of heirs who forthwith claimed the inheritance *stirpe*, that is, by reason of their direct descent from this nearest agnate. The claim thus appeared perfectly simple and readily adjudicable. But the legal representatives of the *gens Claudia* were alive to their opportunity, and put in the counter-claim that the right of the deceased nearest agnate to the inheritance from his relative lapsed by his death before he entered upon possession (a voluntary passing-by of the inheritance would have had the same effect), and that to such a right no succession was by law recognized. Therefore, so claimed the Claudii, both direct heirs and agnates qualified to succeed failed the intestate decedent and the inheritance must therefore fall, according to the Twelve Tables, to the Claudii as a *gens*. They therefore claimed *gente* as the group of Marcelli claimed *stirpe*. This was, I take it, the primary issue raised before the centumviral court.

Had the law been as well determined and its enunciation as clear as it was when Gaius wrote, there can hardly be a question that the claim of the Marcelli would have been at once thrown out of court, for Gaius (iii. 12) distinctly declares the law to be as I assume the representatives of the *gens Claudia* claimed. But I imagine that the law on this point had not been distinctly established at the time when the famous suit of the *gens Claudia* v. certain individual Claudii Marcelli came to trial. Very possibly the decision entered in this case determined the law for the future as Gaius records it.

[1]The claim of the Claudii need not have been exclusive. They may have sought to share with all existing Marcelli the gentile reversion.

And one may easily see how the simple issue above outlined became yet further complicated before the case was fairly on. The fact that the intestate decedent was the son of a freedman raised questions concerning the proper definition of *agnati*. The possibility that the claim of the contesting Marcelli who claimed *stirpe* might be rejected, and the inheritance pass to the *gens*, prompted the representatives of the entire body of Claudii Marcelli to interject a claim that they constituted a legally independent *gens*, upon which, instead of upon the *gens Claudia* as a whole (or possibly the *gens Claudia* to the exclusion of the plebeian and illegitimate *gens Claudia Marcella?*), the inheritance should devolve. Therefore, as Cicero through the mouth of Crassus intimates, the whole complex question of stirpal and gentile relations as concerned with the law of inheritance had to be argued.

It may be remarked that at a later date the praetor found the law as recorded by Gaius (iii. 12) too harsh, and deliberately changed it by his edict (Just. *Inst.* iii. 2. 7), as even before the time of Gaius he had ameliorated a number of the inequitable provisions of the law of inheritance (Gaius iii. 25).

The case of the Marcelli as I have thus hypothetically reconstituted it appears to account naturally, simply, reasonably, and in perfect accord with what we know of Roman law, for all the elements involved in Cicero's statement, and it does this without introducing any uncalled-for complexities such as appear to me to have been assumed by certain of the other forms of explanation. I might, to be sure, argue the matter in detail, especially as against the more involved theories, but it hardly seems to me to be necessary.

E. T. M.]

EMENDATION OF THEOPHRASTUS *DE SENS.* 64, DIELS *VORSOKRATIKER*[2] 375, 44

Πλὴν οὐχ ἁπάντων ἀποδίδωσι τὰς μορφάς, ἀλλὰ μᾶλλον τῶν χυλῶν καὶ τῶν χρωμάτων, καὶ τούτων ἀκριβέστερον διορίζει τὰ περὶ τοὺς χυλούς, ἀναφέρων τὴν φαντασίαν πρὸς ἄνθρωπον.

Instead of καὶ τούτων we should probably, not, of course, necessarily, read καὶ αὐτῶν τούτων or καὶ τούτων αὐτῶν which is the regular formula for defining a class within a class.

Cf. Plato *Republic* 412B ἆρ' οὐκ αὐτῶν τούτων οἵτινες ἄρξουσι—the rulers within the group of guardians. 437D ἐπιθυμιῶν τι φήσομεν εἶναι εἶδος, καὶ ἐναργεστάτας αὐτῶν τούτων ἥν τε δίψαν καλοῦμεν καὶ ἣν πεῖναν; where Jowett goes astray. 457A τούτων δ' αὐτῶν τὰ ἐλαφρότερα· 617A αὐτῶν δὲ τούτων τάχιστα μὲν ἰέναι τὸν ὄγδοον. Phaedo 114C, Symp. 198D ἐξ αὐτῶν δὲ τούτων τὰ κάλλιστα ἐκλεγομένους. Gorgias 517D τούτων γὰρ πoριστικὸν ἢ κάπηλον ὄντα ἢ ἔμπορον ἢ δημιουργόν του αὐτῶν τούτων where I think it is not refining overmuch to say that αὐτῶν τούτων does not refer directly to τούτων but rather to the implied objects of the traffic of the κάπηλος and the ἔμπορος. *Laws* 803A—Isoc. 3.10 μάλιστα πρέποντας ἐμοὶ τούς . . . . καὶ τούτων αὐτῶν